Petition

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

81-242

NO. _____

SUPREME COURT

OF THE UNITED STATES

AUGUST TERM 1981

Hobert W. Fischer)
)
Petitioner,)
)
VS.)
)
Audley Vonck)
)
Respondent.)

ON PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MISSOURI,

WESTERN DISTRICT

Hobert W. Fischer
510 East 29th Avenue
No. Kansas City, MO 64116
(816) 471-2667

Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner who had no choice but to file his damage suit pro se is entitled to a jury trial and verdict by the jury, in accordance with the United States Constituion, and Missouri law.

2. Whether the petition was really so defective as not to show any hurt.

3. Whether the merits of the case should be ignored in this personal injury case.

4. Whether the exhibits that contain all the facts and the proof should be ignored.

5. Whether Judge Moore was wrong by saying that plaintiff's "Answer to Defendant's Motion to Dismiss for April, 1980," was no aid in tracing the case. (L.F. 15.)

6. Whether Judge Wasserstrom should not have rejected petitioner's pro se brief in light of and under the provision of rule

84.08 to waive compliance with the provisions of rule 84.04, on July 2, 1980.

7. Whether the judgment of dismissal is affirmed by Judge Kennedy on March 2, 1981, in opinion filed for No. WD 31827 in the Missouri Court of Appeals, Western District, was in any way correct, while admitting it is not worthwhile to sift the petition if it contains all other necessary allegations, since he is saying he never even read the petition, nor examined any exhibits, for facts, proof and merits of the case.

8. Whether the denying of transfer was in any way proper, by the Missouri Supreme Court May 11, 1981, in view of the matter presented in the above items 1 thru 7.

PARTIES TO THE PROCEEDING

All parties to the proceeding are included in the caption of the case.

TABLE OF CONTENTS

	Page (s)
Parties to the Proceeding	2
Opinions of the Courts Below	6
Jurisdiction of the Supreme Court . . .	7
Constitutional Provision Involved . . .	8
Statement of the Case	8
Statement of Fact	9
Argument	12
Conclusion	18

TABLE OF CASES

Page (s)

Otto V. Farmers Ins. Co., 558 S.W., 2d 713,715 (1) (Mo. App. 1977) 13

Pagan v. City of Kennett, 427 S.W. 2d 251, 252 (3) (Mo. App. 1968) 14

Maddock v. Lewis, 386 S.W.2d 406, 409 (Mo. 1965) 14

Blackburn v. Finke, 376 S.W.2d 225 (Mo. 1964). 14

Williamson's Estate v. Williamson, 380 S.W. 2d 333 (Mo. 1964) 16

Ghadiali v. Delaware State Medical Society et al., 48F. Supp. 789 (Delaware D.C. 1943). 17

OPINIONS OF THE COURTS BELOW

1. The order of Judge Hanna of the Circuit Court, dated October 26, 1978, is included in the appendix and hereto marked Appendix A.

2. The order by Judge Clark of the Circuit Court dated October 30, 1978, is included in the appendix hereto marked Appendix B.

3. The order Transferring Cause by Judge Bondurant, dated April 5, 1979, is included in the appendix hereto marked Appendix C.

4. The order by Judge Mason of Circuit Court dated July 10, 1979, is included in the appendix hereto marked Appendix D.

5. The order by Judge Moore of Circuit Court dated March 11, 1980 is included in the appendix hereto marked Appendix E.

6. The order by Judge Moore of Circuit Court dated March 11, 1980 is in-

cluded in the appendix hereto marked Appendix F.

7. The Memorandum and Judgment by Judge Moore dated May 2, 1980, is included in the appendix hereto marked Appendix G.

8. The order by Judge Wasserstrom dated July 2, 1980, of the Missouri Court of Appeals, Western District, is included in the appendix hereto marked Appendix H.

9. The Opinion filed March 2, 1981, No. WD 31827 by Judge Kennedy of the Missouri Court of Appeals, Western District, is included in the appendix hereto marked Appendix I.

10. The order by the Supreme Court of Missouri, dated May 11, 1981, is included and hereto marked Appendix J.

JURISDICTION OF THE SUPREME COURT

A concise statement of the grounds on which the jurisdiction of the United States Supreme Court is invoked follows:

1. The date of order by the Missouri

Supreme Court, denying transfer, and the date of its entry is May 11, 1981.

2. There are no orders respecting a rehearing or granting an extension of time within which to petition for certiorari.

3. It is believed that Title 28 U.S.C., Section 1254 - 1254 (1) confers on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 14: Equal Rights Amendment 5:

No person shall ... be deprived of life, liberty, or property, without due process of law

STATEMENT OF THE CASE

The appellant, plaintiff, petitioner, filed a petition for damages, malpractice, against Audley Vonck, respondent a practicing attorney. The claim relates to a suit filed on behalf of plaintiff by Louis J. Pelofsky, a practicing attorney against the

plaintiff's former employer, the Missouri Pacific Railroad Company. Plaintiff had received a bad head injury while performing his regular duties as a switchman. Louis J. Pelofsky did not answer interrogatories and the case was dismissed. Audley Vonck, whom plaintiff asked to check the files, lied to him when he told him there was nothing he could do about it.

STATEMENT OF FACTS

On January 28, 1964, petitioner was hurt on the job at the Missouri Pacific Railroad Co., and dismissed a few days later. He gave his personal injury case to Louis J. Pelofsky, who filed this cause on February 25, 1965, No. 666946. In July, 1971, Louis J. Pelofsky died. A couple of weeks later petitioner went to his office to find out who would take care of his injury case. Petitioner talked to Lawrence Pelofsky, Louis's brother and a practicing attorney and was told he would

have Joel, Louis's son, also a practicing attorney, bring me up to date on it. He never did.

After calling on a lawyer in Lexington, Missouri, who told him to better have someone check the files. Audley Vonck checked the files a few days later, July 28, 1973. Vonck found the injury case and two more cases filed by Allan R. Browne, practicing attorney for Breach of Contract for wrongful discharge of employee. Vonck told petitioner,"this all hangs together, I'd like to help you, but there is nothing I can do. They opened up the barn door and turned the horses out, and they are so far out now there is nothing I can do."

Vonck had lied, not told the truth, but petitioner did not know it. A few weeks later petitioner started calling on other lawyers and was lied to some more. This went on for years. Then, on March 17, 1978, Clayton A. Chittim, practicing attorney,

contracted for the personal injury case, taking $250.00 for retainer that was not to be refunded. Then, in July he told me that my case had been dismissed in September, 1967, because Pelofsky had not answered interrogatories, had been dismissed without prejudice.

Chittim was no longer interested in my case. He said the Missouri Pacific Railroad Company is now out of it. He said at the time Vonck checked the files he could have sued the Pelofsky estate, but that it was too late for that now, and you know how we hate to sue lawyers. He was not interested in sueing Vonck.

I had no choice but to file pro se.

On July 28, 1978, I filed my case No. CV78-2528 against Audley Vonck and twelve other lawyers, whom I had sought for help and who could have told me the truth of the matter.

The case started on its path through

the court, and came on first before Judge Meyers, then Judge Hanna, Judge Clark, Keith Bondurant, Judge Mason and Judge Moore. One judge would release a few and another a few and so on, leaving only respondant Audley Vonck, and Judge Moore released him.

Petitioner appealed this decision.

On July 2, 1980, Judge Wasserstrom of the Missouri Court of Appeals, Western District, rejected my brief. Petitioner employed Jay Crotchett, practicing attorney new in the area, tc amend the brief.

On March 2, 1981, Judge Kennedy of the Missouri Court of Appeals, filed his opinion on NO. WD 31827, and affirmed the judgment.

On April 9, 1981, Jay Crotchett applied for transfer to the Supreme Court of Missouri.

On May 11, 1981, the transfer was denied by the Supreme Court of Missouri.

ARGUMENT

I. There are Special and Important Reasons

for Granting Certiorari in this case.

This is a railroad injury case, and a head injury the petitioner can still feel and caused him to go to the doctor for treatments three and four times a week for years, and that in itself says it all. Petitioner wanted a jury trial and was entitled to one according to Judge Bondurant, at a hearing with Pelofsky.

This case was first filed by Louis J. Pelofsky, and deliberately dumped by him.

Petitioner had no choice but to file his case against respondent Vonck pro se, and the petition shows plenty cause of action. With the facts and proof in the legal file and exhibits furnished.

How sad is the judgment of Judge Kennedy, as he states in his opinion filed WD 31827 March 2, 1981, last page, "it's not worth while to sift the petition to find if it contains all other necessary allegations." Judge Kennedy was not pro-

tecting my interest.

On July 2, 1980, my interest was not protected by Judge Wasserstrom when he rejected my brief, because of rule 84.04 and all its subparts, forgetting about rule 84.08 and waive compliance with the provision of 84.04 and consider the case on its merits.

2. It is settled law in Missouri that in the face of a motion to dismiss, the pleadings are given all favorable inferences and a reasonable intendment. The pleadings are not to be construed narrowly. J. Louis Crum Corp. V. Alfred Lindgren, Inc., 564 S.W. 2d 544 (MO. 1978). The same law applies to summary judgment. In Peer V. MFA Milling Co., 578 S.W. 2d 291 (Mo. 1979) this court said:

> In determining whether the trial court erred in entering summary judgment in favor of the defendant this court must view the record in the light most favorable to the plaintiff. Otto V. Farmers Ins. Co., 558 S.W.2d 713, 715 (1) (Mo. App. 1977). Summary

judgment is a drastic remedy, Seliga, supra, 558 S.W. 2d at 331. A 'genuine issue of fact exists, precluding the rendition of summary judgment, when there is the 'slightest doubt' as to the facts, PAGAN v. CITY OF KENNETT, 427 S.W. 2d 251, 252 (3) (Mo. App. 1968); MADDOCK V. LEWIS, 386 S.W.2d 406, 409 (Mo. 1965), so long as the fact in doubt is a material one which has 'legal probative force as to a controlling issue.' SELIGA supra 558 S.W.2d at 331.

As one leading authority has pointed out, 'Although a motion for summary judgment may be made in any civil action, it is not commonly interposed, and even less frequently granted in negligence actions.' WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, Vol. 10, Sec. 2729, p 559. Our supreme court has evinced a pronounced reluctance to affirm the granting of summary judgment relief to a tort defendant. See, for example, BLACKBURN V. FINKE, 376 S.W.2d 225 (MO. 1964)."

3. As far as petitioner's petitions and amended ones are concerned, may be a long ways from being perfect, petitioner admits he is not perfect, and knows lawyers are not perfect, judges are not perfect and the legal system is not perfect. That no one is perfect. Looking at amended petition (L.F. 13) we have a liberal

construction favorable to appellant, petitioner, that does indicate a cause of action. In paragraph six (L.F. 13) petitioner alleges an attorney client relationship by saying he paid respondent to check the files. He further states that respondent claimed there was nothing he (petitioner) could do about his claim against the railroad, Louis Pelofsky's estate. That statement taken in conjunction with the next paragraph (7) stating that Clayton A. Chittim, practicing attorney, subsequently informed petitioner that at the time respondant Vonck checked the files, petitioner could have sued the Pelofsky estate, but that it was too late, now infers that petitioner is alleging negligence on the part of respondent.

In paragraph (12) of appellant's petition (L.F. 14) appellant refers to damages suffered as a result of his original claim which was deliberately dumped by

Pelofsky. In addition he claims actual damages of $800.00 and punitive damages of $800.99.

The appellant who had never dreamed it would ever become necessary for him to file his own petition for damages, but was put into it by practicing attorneys that sold him down the river, bringing on his dilemma, did attempt to use proper channels, rather than violence, may not have been definite as according to rule. However, in Williamson's Estate V. Williamson, 380 S.W. 2d 333 (MO 1964) the court said:

> "Our decisions have generally ruled that a petition is not to be held insufficient merely because of lack of definitness or uncertainty in an allegation."

An important factor for the Court to bear in mind as it considers the sufficiency of appellant's petition is the fact that it was not drafted by an attorney. The federal court has said in

Ghadiali V. Delaware State Medical Society et al., 48F. Supp. 789 (Delaware D.C. 1943).

Petitioner is entitled to a trial by jury and a verdict by the jury under Missouri law and should be under federal. It has always been the belief that the United States Constitution guaranteed liberty and justice for all. The Constitution does not say if you can get a lawyer to help with the legal matter. If you have $15,000 to pay a lawyer if he wants to take your case. If you can follow the rules.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that writ of certiorari should issu review judgment, and not be mad suffer more. The loss of an impor nt right to have a trial on the merits by a jury. The remedy is simple, permit a jury trial and a verdict

by the jury. Seventeen years is a long wait.

Respectfully submitted

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Pro Se

APPENDIX A

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobert W. Fischer	)	
	)	
Plaintiff	)	
	)	Case No. CV78-2528
vs.	)	
	)	Docket "C"
Audley Vonck, et al	)	
	)	
Defendant	)	

O R D E R

OCTOBER 26, 1978 --Defendant Pink has filed his motion for summary judgment with supporting affidavit which remains uncontested. That motion is sustained and plaintiff's cause of action against defendant Pink is dismissed.

Defendant Vonck has filed a motion for summary judgment. It will be treated as a motion to dismiss for failure to state a cause of action. That motion is sustained but plaintiff is granted 20 days to file an amended petition as to defendant Vonck.

Defendant Browne has filed a motion requiring plaintiff to post security for costs. It appears that there may be a duplicity of actions filed by plaintiff. Therefore, the motion is sustained and plaintiff will be required to post $200.00 with the Court Administrator's Office as security for costs as to defendant Browne.

Defendants' Albano, Piedimonte, and Phillips motion to transfer this case to Division 14 to some "identical" but unidentified "cause of action" is overruled.

Defendant Browne's motion to dismiss or, alternatively, to make plaintiff's petition more definite and certain, would probably be sustained in the same manner as defendant Vonck's motion but for the answer to the petition filed by defendant Browne filed August 29, 1978. Therefore, the motion is overruled.

The separate motions of defendants Love, Perry, Pratt and Neds are sustained but

plaintiff is granted 20 days to file his amended petition as to these defendants.

The separate motion of defendant Albano is overruled, defendant Albano having filed his answer to plaintiff's petition on August 24, 1978.

The court makes no ruling on defendant Larson's motion.

The defendant Burrus' motion to dismiss is sustained but plaintiff is granted 20 days to filed his amended petition as to this defendant.

The case is transferred to the Presiding Judge for reassignment to a ruling on defendant Larson's motion.

(Signed)

Forest W. Hanna
Judge

October 26, 1978

APPENDIX B

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobert W. Fischer	)	
	)	
Plaintiff	)	
	)	Case No. CV78-2528
vs.	)	
	)	Docket PJ
Audley Vonck, et al,	)	
	)	
Defendants	)	

O R D E R

Now on this 30th day of October, 1978, this cause being considered on the motion of defendant Roy A. Larson to dismiss plaintiff's petition and such motion being unopposed and the court taking judicial notice of its records and files in case CV78-1181 now pending in Division 14, finds that the same facts are alleged in said case by plaintiff as are alleged herein, that the claims of plaintiff all arise out of the same events and that plaintiff is precluded from asserting such claims in two actions.

Wherefore, the motion of defendant Roy A. Larson to dismiss is sustained and plaintiff's cause of action as to said defendant is hereby dismissed at plaintiff's costs without prejudice, however, to all claims heretofore or hereafter asserted by plaintiff against said defendant in the said case CV78-1181.

(Signed)

Donald B. Clark
Judge
Sitting for Division 13

October 30, 1978

APPENDIX C

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobart Fischer,	)	
	)	
Plaintiff	)	
	)	
vs.	)	No. CV78-2528
	)	
Audley Vonck, et al	)	
	)	
Defendant	)	

ORDER TRANSFERRING CAUSE

Now on this 5th day of April, 1979, by agreement of the judges, this cause is transferred to Civil Docket F , Division 11, pursuant to Circuit Court Rule 2.03 and for consolidation with CV78-1181.

(Signed)

Keith P. Bondurant
Judge

APPENDIX D

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobert W. Fischer	)	
	)	
Plaintiff	)	
	)	No. CV78-2528
vs.	)	
	)	Docket F - 11
Audley Vonck, et al.	)	
	)	
Defendant	)	

O R D E R

Plaintiff's amended pleading still does not state a cause of action as to defendants Albano, Piedemonte and Phillips. The Motion to Dismiss filed by those defendants is sustained and plaintiff's petition is dismissed with prejudice at the cost of plaintiff.

(Signed)

Donald J. Mason
Judge

July 10, 1979

APPENDIX E

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobert W. Fischer	)	
	)	
Plaintiff	)	
	)	No. CV78-2528
vs.	)	
	)	Docket F
Audley Vonck, et al.,	)	
	)	
Defendant	)	

O R D E R

An order was entered April 30, 1979 consolidating this cause with CV78-1181. It now appears that some dozen attorneys have been dismissed in this cause and that separat trials will be more condusive to expedition and economy.

Accordingly, it is ORDERED that this cause be severed and separated from CV78-1811 and that a copy of this ORDER be placed in the file of CV78-1811.

(Signed)

James A. Moore,
Judge

March 11, 1980

Hobert W. Fischer,	)	
	)	
Plaintiff	)	
	)	NO. CV78-2528
vs.	)	
	)	Docket F
Audley Vonck, et al.,	)	
	)	
Defendant	)	

O R D E R

An Order was entered October 26, 1978 reading in pertinent part: "Defendant Vonck has filed a Motion for Summary Judgment. It will be treated as a motion to dismiss for failure to state cause of action. That motion is sustained but plaintiff is granted 20 days to file an amended petition as to defendant Vonck."

Within the time limited and on October 20, 1978 plaintiff filed "Amended Petition for Audley Vonck." The "Amended Petition for Audley Vonck" appears to be small, if any, improvement upon its predecessor. Plaintiff should be given further opportunity to state a claim.

It is ORDERED that plaintiff have 20 days within which to file and serve upon counsel for defendant Vonck a further amended petition and that defendant Vonck have 15 days thereafter to respond thereto.

(Signed)

James A. Moore
Judge

March 11, 1980

IN THE CIRCUIT COURT OF

JACKSON COUNTY, MISSOURI

Hobert W. Fischer, Plaintiff	)	Case. No. CV78-2528
vs.	)	Docket "F"
Audley Vonck, Defendant.	)	

M E M O R A N D U M and J U D G M E N T

Following the entry of the Order of March 11, 1980, giving plaintiff leave "to file and serve upon counsel for defendant Vonck a further amended petition", plaintiff did file and serve "Further Amended Petition for Audley Vonck, as ordered by Judge Moore March 11, 1980." Defendant Vonck's counsel responded with his Motion to Dismiss to which was attached a copy of the Order of February 16, 1979 in Case No. CV78-1811.

Neither the most recently amended petition nor the response thereto is a model of artificiality. Nor does the "Answer to

Defendant's Motion To Dismiss for April, 1980, Defendant Vonck" aid in tracing "plaintiff's tortious (sic) path through this court". The question remains which was posed by the Order of March 11, 1980. Does plaintiff state a claim upon which relief can be granted?

Plaintiff does not for several reasons. He fails to plead an attorney-client relationship, a duty of defendant Vonck to plaintiff, a breach of such duty, causation, and even a coherent statement of injury or damage. Once again plaintiff's petition as to defendant Vonck is found insufficient. Other defendants have already been dismissed from the cause.

WHEREFORE, it is CONSIDERED and ADJUDGED that the plaintiff take nothing by his petition and defendants go hence without day together with their costs, for which let execution issue.

(Signed)

James A. Moore
Judge

May 2, 1980

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

Hobert W. Fisher, Appellant,	)	
v.	)	WD 31682
Robert Dakopolos, Respondent.	)	

O R D E R

NOW ON THIS DAY the Court, after reviewing Appellant's brief and being fully advised in the premises, does hereby order and decree that Appellant's brief be stricken for failure to comply with Supreme Court Rule 84.04 (b), (c), (d) and (e) in light of Thummel v. King, 570 S.W.2d 679 (MO. banc 1978).

IT IS THEREFORE ORDERED that Appellant be and is hereby granted 30 days from this date to file an amended brief; Respondent's brief due 30 days thereafter.

Dated this 30th day of June, 1980.

(Signed)

Solbert M. Wasserstrom,
Chief Judge

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

HOBERT W. FISCHER, Appellant,	)	No. WD 31682
v.	)	
ROBERT A. DAKOPOLOS, Respondent.	)	Opinion Filed March 2, 1981

APPEAL FROM THE CIRCUIT COURT

OF JACKSON COUNTY

HONORABLE JAMES A. MOORE, JUDGE

BEFORE KENNEDY, P.J.,

SHANGLER AND SOMERVILLE, JJ.

On March 10, 1980, the trial court sustained defendant Dakapolos' motion to dismiss plaintiff's pro se petition for damages.[1] The dismissed petition under-

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1. A prior appeal of the case, resulting in the dismissal of a co-defendant, is found at 586 S.W.2d 733. The background of the case is there more fully stated.

took to state a claim for malpractice in the handling of a personal injuries claim against the Missouri Pacific Railway Company. The motion, in accordance with an earlier order, was treated as a motion for summary judgment, Rule 55.27 (a) and Rule 74.04.

Plaintiff thereafter filed in the Jackson County Circuit Court a paper designated "Appeal Request." Respondent says we do not have jurisdiction of the appeal because the "Appeal Request" does not specify "the court to which the appeal is taken", as required by Supreme Court Rule 81.08(a). State v. Snider, 536 S.W.2d 516 (Mo. App. 1976). Accompanying the purported notice of appeal, on a form prescribed for the purpose, is a "Civil Case Information Form" which does include the name of this court. We may construe the two documents together and we conclude that the latter supplies the

deficiency of the former. We have jurisdiction. See Weller v. Hayes Truck Lines, 197 S.W.2d 657 (Mo. banc 1946); Stubblefield v. Seals, 485 S.W.2d 126, 129 (Mo. App. 1972); Krall v. Light, 210 S.W.2d 739, 743 (Mo. App. 1948).

We conclude the court correctly gave judgment against the plaintiff and for the defendant.

The petition, when given all favorable inferences and reasonable intendments, and when broadly and liberally construed, J. Louis Crum Corp. v. Alfred Lindgren, Ind., 546 S.W.2d 544 (Mo. App. 1978); Wallis v. St. Louis County, 563 S.W. 2d 93, 95 (Mo. App. 1978); Euge V. Golden, 551 S.W.2d 928, 931 (Mo. App. 1977), still fails to state a claim upon which relief can be granted. There is no allegation of any basis for a meritorious claim for damages against the railroad company, nor is there any allegation of what the defendant did or

omitted which caused plaintiff's damage.[2]

No request was made to the trial court for leave to amend the petition, nor were facts suggested to the trial court or to this court which, if added to the petition by amendment, would have stated a claim entitling the plaintiff to relief.

The judgment is affirmed.

All concur.

Don W. Kennedy,
Presiding Judge

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2. See, for the essential elements of a legal malpractice claim, Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W. 2d 686, 692 (1) (Minn. 1980); 7A C.J.S., Attorney and Client, § 269 (1980).

APPENDIX J

Supreme Court No. 62975

In the Supreme Court of Missouri

Western District No. 31827

May Session 19 81

Hobert Fischer, Appellant,

vs. TRANSFER

Audley Vonck, Respondent.

Now at this day, on consideration of Appellant's *application to transfer the above entitled cause from the* Western District *Court of Appeals, it is ordered that said application be, and the same is hereby denied.*

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May *Session thereof, 19* 81 *, and on the* 11th *day of* May *19* 81 *, in the above entitled cause.*

Given under my hand and seal of said Court, at the City of Jefferson City, this 11th *day of* May *19* 81.

Thomas F. Simon Clerk.

Anne Eickhoff D. C.

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that he delivered three (3) copies of the foregoing Petition for Certiorari, on July 30, 1981, to:

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Hobart W. Fischer

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